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August 13, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: *I/M/O National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing and Billing Format*, CG Docket No. 04-208

Dear Ms. Dortch:

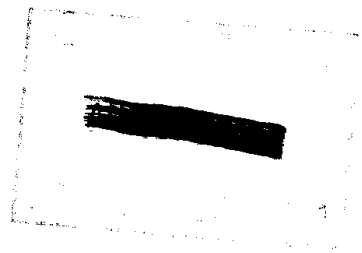
Pursuant to 47 C.F.R. § 1.51, enclosed for filing in this matter is an original and four copies of the *National Association of State Utility Consumer Advocates' Reply Comments*. NASUCA has also filed its Reply Comments electronically via the Commission's ECFS.

Very truly yours,

PATRICK W. PEARLMAN
WV State Bar No. 5755

PWP/s
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



In the Matter of	)	
	)	
National Association of State Utility	)	CG Docket No. 04-208
Consumer Advocates' Petition for	)	
Declaratory Ruling Regarding	)	
Truth-In-Billing and Billing Format	)	

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES' REPLY COMMENTS

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TABLE OF CONTENTS

SUMMARY

On March 30, 2004, the National Association of State Utility Consumer Advocates ("NASUCA") filed a petition with the Commission,[1] in the Commission's Truth-in-Billing ("TIB") proceeding,[2] requesting that the Commission issue a declaratory ruling addressing interexchange carriers' ("IXCs") and commercial mobile radio service ("CMRS" or "wireless") carriers' increasing use of monthly line items. The Commission referred NASUCA's petition to its Consumer and Government Affairs Bureau, which docketed the proceeding as CG 04-208 and released a public notice establishing dates for the submission of initial and reply comments. At NASUCA's request, the reply comment deadline was subsequently extended by 15 days.[3]

Initial comments were filed by numerous parties. Comments in support of NASUCA's petition were filed by 16 parties, as well as 19 individual consumers. Comments opposing NASUCA's petition were filed by 18 parties,[4] and it is to these parties' opposing comments that NASUCA's reply comments are chiefly directed.

In its Petition, NASUCA seeks to have the Commission address, in the context of its TIB proceeding, the growing use by both IXCs and CMRS carriers of monthly line items – fees and surcharges that recover the carriers' operating costs, including costs of complying with various government regulatory programs. NASUCA asserted that these line items violate the

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[1] *In the Matter of National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing,* CG Docket No. 04-208, Petition (filed March 30, 2004) ("Petition").

[2] *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170.

[3] *In the Matter of National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-In-Billing,* CG Docket No. 04-208, 04-1820, Order, (rel. June 24, 2004).

[4] The following persons filed comments opposing NASUCA's petition: AT&T Corporation ("AT&T"); AT&T Wireless Services, Inc. ("AWS"); BellSouth Corporation ("BellSouth"); The Coalition for a Competitive Telecommunications Markets ("Competitive Coalition"); Cingular Wireless LLC ("Cingular"); the CTIA – The Wireless Association ("CTIA"); Global Crossing North America, Inc.; IDT America, Corp. ("IDT"); Leap Wireless International, Inc. ("Leap"); MCI, Inc. ("MCI"); The National Telecommunications Cooperative Association ("NTCA"); Nextel Communications, Inc. and Nextel Partners, Inc. ("Nextel"); Rural Cellular Association ("RCA"); Sprint Corporation ("Sprint"); United States Cellular Corporation ("US Cellular"); The United States Communications Association ("USCA"); The United States Telecom Association ("USTA"); the Verizon telephone companies ("Verizon"); and Verizon Wireless ("VZW").

Commission's *TIB Order*[5] and Sections 201 and 202 of the Communications Act of 1934, as amended ("Act")[6] because, among other things: (1) they are misleading and deceptive, confusing consumers with respect to the origin of the charges in question; (2) they are misleading and deceptive, confusing consumers with regard to the prices consumers pay for the services they receive; (3) they are misleading and deceptive, in violation of the *TIB Order*, in that many imply that they are required by the government when in fact they have never been expressly mandated or authorized by any governmental agency; (4) they are misleading and deceptive in that carriers' advertising does not disclose these hidden fees and charges; (5) they are unreasonable billing practices in that they bear no demonstrable relationship to the costs of government regulation they recover; and (6) they are anti-competitive in that carriers are able to mask their economic inefficiencies while they advertise low usage-based and monthly rates for telecommunications service.

Comments opposing NASUCA raise numerous arguments, factual, procedural and legal, and request that the Commission deny NASUCA's Petition. The Commission should reject the commenters' arguments and issue the ruling sought by NASUCA, at least with respect to so-called "regulatory" line items. If the Commission determines that its current *TIB Order* does not address other line items utilized by carriers, NASUCA requests that the Commission initiate a Notice of Proposed Rulemaking to receive comments regarding whether other line items should also be restricted.

The commenters' arguments in opposition to the Petition should be rejected for several reasons including the following: *First*, the commenters mischaracterize the ruling NASUCA seeks in its Petition. Commenters wrongly suggest that NASUCA seeks to ban the use of all line

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[5] *See In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72 (rel. May 11, 1999) ("*TIB Order*").
[6] 47 U.S.C. §§ 151 *et seq.*

items or that NASUCA seeks to have carriers hide all their costs in one lump sum rate. NASUCA seeks to prohibit all line items and surcharges that are not expressly mandated or authorized by federal, state or local government. *Second*, contrary to commenters' arguments otherwise, the *TIB Order* did not authorize the line items in question; instead the *TIB Order* – and subsequent Commission orders – authorized carriers to recover costs associated with complying with a narrow set of Commission regulatory programs. The line items in question were not widely employed at the time the Commission's orders were issued and were not considered in any of the relevant Commission orders. *Third*, the carriers have failed to show that their line items are not, in fact, misleading or deceptive, nor have the carriers shown that the line items are reasonably related to the regulatory compliance costs they purport to recover. *Fourth*, the restriction on the use of line items sought in the Petition does not violate the carriers' First Amendment rights. The restrictions NASUCA seeks are either regulation of carriers' conduct (*i.e.*, their billing practices) or, if a regulation of speech, constitute a permissible regulation of commercial speech. *Fifth*, the proposed restriction on the use of line items NASUCA seeks is not an improper shifting of the burden of taxation.

The line items and surcharges identified by NASUCA constitute a burden on consumers and an impediment to the development of competition. The Commission should rule immediately to prohibit all line items and surcharges that are not expressly mandated or authorized by federal, state or local government. If the Commission decides that it cannot deal with all identified line items and surcharges within the context of the TIB docket, it should expeditiously initiate a new rulemaking to consider all line items and surcharges that fall outside the scope of the TIB proceeding.

Before the
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NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES' REPLY COMMENTS

Pursuant to the Federal Communications Commission's ("Commission") May 25, 2004, public notice, as modified by subsequent order, the National Association of State Utility Consumer Advocates ("NASUCA") hereby submits its reply comments in this proceeding. For the reasons set forth herein, the Commission should enter an order granting the relief sought by NASUCA in its March 30, 2004, petition for a declaratory ruling. The Commission should prohibit carriers from imposing line item charges and fees on customer bills, unless those charges and fees are expressly mandated or authorized by federal, state or local governments.[7]

I. OPPONENTS MISREPRESENT NASUCA'S PETITION.

As the Commission is well aware, in its March 30, 2004, petition NASUCA sought a declaratory ruling prohibiting all line-items and surcharges on customer bills, unless such surcharges and line-items were expressly mandated or authorized by federal, state or local government. Many commenters have misrepresented NASUCA's position, or argued that the relief which NASUCA seeks cannot be granted in the pending Truth-in-Billing ("TIB") docket.[8] The Commission should ignore these misrepresentations and provide a remedy to the proliferation of unnecessary and misleading surcharges and line-items on customers' bills.

[7]NASUCA Petition for Declaratory Ruling, p. 68 (hereinafter "Petition").
[8]*In the Matter of Truth in Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72 (May 11, 1999) (hereinafter "TIB").

However, to the extent that all of the relief requested by NASUCA cannot be fashioned within the TIB proceeding, the Commission should expeditiously initiate a new notice to complement actions taken in this docket.

A. NASUCA's Petition Does Not Seek To Prohibit Line Items Expressly Mandated Or Authorized By Federal, State Or Local Law.

Some commenters argue that NASUCA seeks to preclude carriers from recovering sums authorized by the Commission and other agencies to fund various regulatory programs.[9] These commenters cite such Commission-authorized charges as the federal universal service fund assessment, and the subscriber line charge ("SLC") which incumbent local exchange carriers ("ILECs") are authorized to recover from end-users.[10] It is obvious that such commenters either did not understand NASUCA's petition or are seeking of mischaracterize it.

The controversy – to the extent one exists – is a matter of semantics. NASUCA *did* use the term "expressly mandated" in connection with those line items that carriers should be allowed to continue recovering as separate line items.[11] In every instance, NASUCA should have said "expressly mandated *or authorized*" in order to make it clear that line items recovering the Commission-established universal service fund contribution or the SLC would not be prohibited. That was NASUCA's intent, even if that intent was not made perfectly clear in its petition. NASUCA mixed the terms "mandated," "imposed," "authorized" and "allowed" in distinguishing between those line items that it was condemning and those it was not. For example, NASUCA wrote: "To be clear, NASUCA is not asking the Commission to overturn prior decisions *allowing* carriers to recover specific assessments *mandated* by regulatory action through line item charges."[12] In discussing the *Contribution Order*,[13] NASUCA noted that the

[9] ATT Comments, pp. 2-3; RCA Comments, pp. 7-9.
[10] *Id.*
[11] See, *e.g.*, Petition, p. 1. However, NASUCA specifically used the term "authorized" in connection with the amounts carriers should be allowed to recover in such line items. *Id.*, p. 68.
[12] Petition, p. vii; 24, 42

Commission "changed the manner in which carriers were *allowed* to recover the assessment *imposed* to cover contributions to federal universal service programs."[14] Similar language abounds in NASUCA's petition.[15]

This clarification – that its petition seeks to prohibit all regulatory line items not expressly mandated or authorized by federal, state or local government action – puts to rest commenters' concerns that many line items authorized by the Commission would be prohibited by the declaratory ruling NASUCA seeks.

B. NASUCA's Petition Does Not Seek To Have All Line Items Rolled Into One Lump Rate.

In yet another exaggerated reading of NASUCA's petition, commenters assert that NASUCA's petition would require carriers to lump all their costs, including government-imposed taxes and fees, into one lump rate.[16] The commenters' mischaracterization of NASUCA's petition cannot be justified by any minor confusion that may have stemmed from NASUCA's failure to use the phrase "expressly mandated" without always including the term "authorized." Carriers should be allowed to recover federal, state and local taxes and fees by means of line-items or surcharges when such line items or surcharges are expressly mandated or authorized by federal, state or local governments. Nothing in NASUCA's petition compels any other result.

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[13] *In the Matter of Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (Dec. 13, 2002) (hereinafter "Contribution Order").

[14] *Id.*, p. 8 ("imposed" was not entirely accurate, since the Commission does not impose the USF contribution – rather it authorizes carriers to recover that assessment through line item charges).

[15] *See, e.g., id.*, p. 30 (TalkAmerica's TSR Administrative Fee appears calculated to be confused with the TRS charges that states and the Commission have *authorized* carriers to recover); p. 32 (OneStar's Primary Carrier Fee appears intended to be confused with the PICC *allowed* by the Commission; "the surcharges imposed by these carriers appear to be recovering *government-authorized* charges"); pp. 38-39 ("Commission should disallow use of such monthly fees . . . under the guise of *government-mandated or imposed* charges"); 42 ("with regard to [NANP or TRS programs], the Commission's rules and orders *permit* carriers to recover their costs associated with such programs"); p. 45 (CMRS carriers' charges are unreasonable "since those charges purport to recover costs that the government has never *authorized* the carriers to recover from end users, or greatly over-recover amounts *authorized* by the Commission"); p. 48 ("Although the Commission *authorized* carriers to recover their costs of implementing number portability early on. . ."); p. 56 ("the Commission has never *authorized* carriers to impose subscriber line items to recover their CALEA compliance costs").

[16] USTA Comments, pp. 5-6; Verizon Comments, p. 9.

NASUCA did not seek a declaratory ruling from the Commission banning carrier line items and surcharges that are expressly mandated or authorized by federal, state or local governments. Yet that is precisely what some of the parties filing comments in opposition to its petition assert in order to justify their opposition. Further, NASUCA did not seek to exclude those line items that recover contributions to government programs mandated by regulatory action, yet again, that is what numerous commenters claim. Finally, NASUCA did not suggest in its petition that all carrier costs should be rolled into one lump sum rate in its petition. Nonetheless, this is what a number of commenters claim.

In short, many commenters misrepresent the goals and scope of NASUCA's petition in order to construct a "straw man" petition that they could then portray as both unreasonable and illegal. The Commission should not be swayed by such facile efforts, and should grant NASUCA's petition.

II. WHAT NASUCA SEEKS IS BOTH CONSISTENT WITH THE COMMISSION'S RULINGS IN THE TIB DOCKET AND OTHER PROCEEDINGS, IS REASONABLE AND IS ULTIMATELY PRO-COMPETITIVE AND PRO-CONSUMER.

Several commenters object to NASUCA's petition on procedural grounds, asserting that the Commission has already authorized the line items at issue in the *TIB Order* and other orders. They argue that NASUCA is really seeking a reversal of the Commission's rules in order to prohibit what the Commission has previously allowed.[17] The commenters note that the purpose of a declaratory ruling is to terminate a controversy or remove uncertainty, and then assert there is no controversy to terminate or uncertainty to remove.[18]

Contrary to these assertions, NASUCA's petition seeks a Commission declaration to do just that, terminate a controversy and remove uncertainty. However, should the Commission

[17] Verizon Comments, p. 10; VZW Comments, p. 7; Sprint Comments, pp. 4-7; ATT Wireless Comments, pp. 4-5; Cingular Comments, p. 2.
[18] USTA Comments, pp. 4-5; AT&T Comments, pp. 5-6; CTIA Comments, pp. 22-24; Sprint Comments, pp. 4-7; BellSouth Comments, pp. 5-6; Verizon Wireless Comments, pp. 6-8.

agree that NASUCA's petition seeks to have the Commission repeal, amend or modify its existing rules, or address line items outside the ambit of the TIB proceeding, then the Commission should treat the petition as a request to initiate a rulemaking regarding the regulatory line items in question. The importance of the issues raised in NASUCA's petition, coupled with the large number of comments supporting it, warrants an expeditious decision on the merits of the issues rather than delay or dismissal on strictly procedural grounds.

A. NASUCA's Petition Seeks To Resolve Uncertainty Or Terminate A Controversy.

The central premise of parties' arguments that NASUCA's petition is procedurally improper is the notion that the Commission has authorized such line items in orders entered in the TIB docket and other proceedings.[19] Having authorized carrier line items in its TIB rules, the commenters argue, NASUCA's petition improperly seeks to reverse those rules through a declaratory ruling.

Contrary to the commenters' assertions, the Commission has never addressed the regulatory line item charges that are included in NASUCA's petition. The Commission has, to be sure, spoken to carriers' ability to impose surcharges on their customers for such things as USF contributions (including administrative costs associated with the USF assessment), costs to implement local number portability and subscriber line charges. The Commission has not, however, authorized the recovery of costs associated with multiple regulatory programs, taxes and other miscellaneous operating costs, in a single line item charge to carriers' customers.

1. The *TIB Order* Did Not Authorize the Line Items at Issue.

In the *TIB Order*, the Commission addressed the broader issue of consumer confusion regarding charges on monthly telephone bills, in addition to dealing with slamming and cramming. Consumer confusion regarding monthly charges was not an insignificant problem.

The Commission noted that "virtually every state and consumer advocacy group that commented," as well as several members of Congress, identified consumer confusion as a growing concern that the Commission should address.[20] Likewise, the Federal Trade Commission ("FTC") argued that Commission intervention "is necessary to help consumers avoid 'falling prey' to unscrupulous service providers who hide or mislabel unauthorized charges on consumers' telephone bills."[21]

As discussed in the Petition, the Commission adopted three broad, "truth-in-billing" principles to ensure that consumers receive "thorough, accurate, and understandable bills" from their telecommunications carriers. The third principle, "full and non-misleading billed charges" – in addition to the "minimal, basic guidelines" adopted by the Commission ". . . designed to prevent the types of consumer fraud and confusion evidenced in the tens of thousands of complaints we have received"[22] - lie at the heart of the controversy in this proceeding. The guidelines addressing billing descriptions and standardized labels for charges resulting from federal regulatory action are particularly relevant.[23]

Several commenters assert that, in the *TIB Order*, the Commission previously rejected any suggestion that line items could to be prohibited, under any circumstances.[24] The Commission's rulings in the *TIB Order* are not nearly as sweeping and conclusive as the commenters suggest, however. For example, commenters cite paragraph 50 of the *TIB Order* in asserting that the Commission authorized, for all time, any line items the carriers see fit to

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[20] *Id.*, ¶ 4.

[21] *Id.*

[22] *Id.*, ¶5.

[23] *Id.*, ¶¶ 37-65; *see* 47 C.F.R. § 64.2401(b) & (c).

[24] AT&T Comments, pp. 6-9; AWS Comments, pp. 3-4; Cingular Comments, pp. 3-5; Leap Comments, pp. 6-7;

impose – so long as those charges are described and identified in a manner that comports with the Commission's guidelines regarding billing descriptions and organization.[25] Here is what the Commission actually wrote:

> We find that the substantial record on this issue supports our adoption of guidelines to address consumers' confusion and potential for misunderstanding concerning the nature of these charges. Specifically . . . we adopt our proposal that require carriers to identify line item charges associated with federal regulatory action through a standard industry-wide label and provide full, clear and non-misleading descriptions of the nature of the charges, and display a toll-free number associated with the charge for consumer inquiries. While we adopt guidelines to facilitate consumer understanding of these charges and comparison among service providers, we decline the recommendations of those that would urge us to limit the manner in which carriers recover these costs of doing business.[26]

The Commission was not speaking prospectively regarding all line items associated with any regulatory action. Instead the Commission was focused "particularly on three types of line items that have appeared on consumers' bills," namely line items associated with contributions to the federal universal service fund, subscriber line charges and costs associated with providing local number portability.[27]

The fact that the regulatory action taken by the Commission in the *TIB Order* was more limited in scope than the commenters suggest is illustrated in other portions of the Commission's *TIB Order*. For example, the Commission noted that "[t]he record in this proceedings supports our concern that the failure of carriers to label and accurately describe *certain line item charges* on their bills has led to increased consumer confusion about the nature of *these changes* [*sic*]."[28] The limited scope of the Commission's *TIB Order* was further clarified in that portion of the order adopting specific guidelines for standardized labels. The Commission wrote:

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[25] Verizon Comments, p. 4.
[26] TIB Order, ¶ 50.
[27] *Id.*, ¶¶ 51-52.
[28] *Id.*, ¶ 53 (emphasis added).

> In the Notice,[29] we generally sought comment on the methods by which the nature and purpose of *these charges* could be clarified. *We adopt the guidelines proposed in our Notice . . . that line-item charges associated with federal regulatory action* should be identified through standard and uniform labels across the industry. We agree that standardized labels will promote consumers' ability to understand their bills, thus facilitating their ability to compare rates and packages among competing providers. Such comparisons are very difficult when carriers choose different names for *the same charge.*[30]

NASUCA does not believe that the Commission, without more specific language, intended that the line items addressed in the *TIB Order* extended well beyond the specific regulatory programs cited by the Commission in both the TIB NPRM and *TIB Order. Other types of line items were not even mentioned.* Certainly the discussion of the SLC, federal universal service assessments and local number portability costs would not, on its face, extend to any federal or regulatory program – of any sort – that might impose costs on a carrier's provision of service, nor to any non-regulatory costs. This same limitation extends to the other portion of the *TIB Order* opponents of NASUCA's petition cite – paragraph 56.

In paragraph 56, the Commission wrote that it "decline[d] to take a more prescriptive approach as to how carriers may recover *these costs*" – meaning costs associated with the charges that were the focus of the Commission's order.[31] The Commission opted not to adopt specific suggestions regarding these charges – such as combining all of them into one charge, or separating out any fees associated with regulatory action, or requiring per-minute rates that include all fees associated with the service. Instead, the Commission wrote:

> We decline *at this time* to mandate such requirements, but rather prefer to afford carriers the freedom to respond to consumer and market forces individually, and consider whether to include *these charges* as part of their rates, or to list the

[29] *I/M/O Truth-In-Billing and Billing Format*, CC Docket No. 98-170, FCC 98-232, Notice of Proposed Rulemaking (rel. Sept. 17, 1998) ("*TIB NPRM*").
[30] *TIB Order*, ¶ 54 (emphasis added). The *TIB NPRM* referred specifically to access charges and universal service fund charges. *TIB NPRM*, ¶¶ 2, 10, 21, 25-26.
[31] *Id.*, ¶ 56.

charges in separate line items.[32]

Even if the commenters' suggestion is correct – that the Commission allowed carriers to utilize line items to recover any costs, in any fashion or amount they desired – the above-quoted language made it clear that the Commission's determination was not set in stone. Declining a more prescriptive approach in 1999 does not prevent the Commission from resolving uncertainties with "grab bag" regulatory line items carriers have begun to use – either in a declaratory ruling or in a rulemaking. Nor, as discussed below, do the other Commission orders cited in opposition to NASUCA's petition compel a broader reading of the *TIB Order*'s scope and effect.

2. The *Contribution Order* Did Not Authorize Carriers to Impose Any Line Item They Wish Under the Guise of "Regulatory Compliance."

Commenters' claim that the Commission authorized all regulatory line items in its *Contribution Order*[33] finds no support in the Commission's order. In the *Contribution Order,* the Commission specifically authorized carriers to recover their administrative costs associated with the collection of universal service charges through their rates or other line items.[34] Specifically, the Commission wrote:

> Contributing carriers still will have the flexibility to recover their contribution costs through their end-user rates if they so choose and to recover any administrative or other costs they currently recover in a universal service line-item through their customer rates *or through another line item.*
>
> * * *
>
> [W]e clarify that *we do not believe it appropriate for carriers to characterize*

[32] *Id.* (emphasis added).

[33] AT&T Comments, pp. 19-20; Competitive Coalition Comments, pp. 7-8; Cingular Comments, p. 2-4; Nextel Comments, pp. 7-11; RCA Comments, p. 3; Sprint Comments, pp. 6-7; Verizon Comments, pp. 4-5; VZW Comments, p. 5 & Fn. 10-11; *see In the Matter of Federal State Joint Board on Universal Service*, Docket No. 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 02-329 (rel. Dec. 13, 2002) ("*Contribution Order*").

[34] *Id.*, ¶¶ 54-55.

> *these administrative and other costs as regulatory fees or universal service charges after April 1, 2003.* These costs, in our view, are no different than other costs associated with the business of providing telecommunications service and may be recovered through rates *or other line item charges.*[35]

Commenters – and many carriers – apparently read the last quoted sentence to mean that *all* costs associated with the business of providing telecommunications service may be recovered through rates or other line item charges. The Commission's order is not nearly as broad as the commenters suggest, however.[36]

Instead the *Contribution Order* merely allows "these costs" (*i.e.*, administrative costs associated with the collection of universal service charges) to be recovered as line items, so long as they are not characterized as regulatory fees or universal service charges. As such, the *Contribution Order* is a natural extension of the limited authorization provided to carriers in the *TIB Order*, namely allowing them to recover their universal service assessments through a line item charge.

Unlike carriers' interpretation of the *Contribution Order*, NASUCA's reading is consistent with the limited issues the Commission was addressing in that order.[37] Nowhere in the *Contribution Order* did the Commission hint that it intended to take such sweeping action as to authorize carriers to use line items to recover *any* costs, whether related to regulatory action or

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[35] *Id.*, ¶¶ 40, 54 (emphasis added).

[36] In its petition, NASUCA noted that the Commission's language in the *Contribution Order* appeared to be an open invitation to carriers to impose line items for any cost to provide telecommunications service and sparked the flood of regulatory line items seen now. NASUCA Petition, p. 9. NASUCA does not agree with the carriers' reading of the *Contribution Order*, nor does NASUCA believe the Commission intended such a broad interpretation of its order – especially in light of the narrowness of its *TIB Order*.

[37] *See Contribution Order*, ¶¶ 1-6, 10-13. For example, the Commission's order took "interim measures to maintain the viability of universal service in the near term. *Id.*, ¶ 1. It also concluded that "carriers may not recover their federal universal service contribution costs through a separate line item that includes a mark-up above the relevant contribution factor beginning April 1, 2003." *Id.*, ¶ 2. The Commission further noted that it "initiated this proceeding to consider alternatives or modifications to a revenue-based system" for funding universal service. *Id.* Finally, the Commission noted its adoption of rules to improve customers' understanding of their telephone bills in the TIB Order, noting that this order focused on "three types of line-item charges that result from federal regulatory action: (1) universal service-related fees; (2) subscriber line charges; and (3) local number portability charges." *Id.*, ¶ 13.

not.[38] To the extent the Commission's language in the *Contribution Order* suggests otherwise, the Commission should make it clear such was not the Commission's intent. Furthermore, even if the Commission endorses the commenters' interpretation of the *Contribution Order*, many of the line items in question are still inappropriate since the charges are characterized as regulatory fees, if not in name then in the manner in which the line items' origins and purposes are described.

3. The *LNP 3rd R&O* Did Not Authorize Carriers to Impose Any Line Item They Wish Under the Guise of "Regulatory Compliance."

Several commenters assert that the Commission authorized them to recover their costs of providing local number portability in line item surcharges or fees.[39] NASUCA never suggested otherwise.[40] NASUCA's complaints regarding wireless ("CMRS") carriers' recovery of number portability costs are not that the CMRS carriers are imposing a line item charge to recover their direct costs of providing number portability, but rather: (1) their imposition of such line items before their customers could utilize this service; (2) their lumping number portability costs together with various other "regulatory" programs' costs; and (3) the fact that the line items being charged appear to be over-recovering wireless carriers' direct costs of implementing portability. Nothing in the CMRS carriers' comments address these concerns.

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[38] Sprint suggests that the Commission eliminated any uncertainty over the lawfulness of regulatory line items in paragraph 55 of the Contribution Order. There the Commission wrote:

> Carriers that are not rate regulated by this Commission, namely interexchange carriers, CMRS providers, and competitive local exchange carriers, will have the same flexibility that exists today to recover legitimate administrative and other related costs. In particular, such costs can always be recovered through these carriers' rates or through other line items. . . . Nothing in this Order modifies our existing Truth-in-Billing requirements.

Contribution Order, ¶ 55. However, the Commission's *Contribution Order* was narrowly focused on the administrative costs associated with the collection of universal service contributions, which the TIB Order had previously made clear could be legitimately recovered via line items.

[39] Cingular Comments, p. 5; Nextel Comments, pp. 8-9; Verizon Comments, pp. 4-5; VZW Comments, p. 5.

[40] Petition, pp. 46-54.

4. The Commission's E911 Rulings Similarly Do Not Authorize the Line Items at Issue.

NASUCA asserted that some CMRS carriers may be recovering costs to implement E911 through surcharges, in contravention of the Commission's directive that such costs be recovered "in their rates."[41] In response, Sprint claims that NASUCA is incorrect, that the Commission did not restrict wireless carriers to recovering their E911 implementation costs in their rates, and that the Commission's "Wireless Bureau (later affirmed by the Commission) in fact held the very opposite."[42] Sprint is half right: the Wireless Bureau's Chief *did* suggest that "as telecommunications carriers whose rates are not regulated, wireless carriers have the option of covering these Phase I costs through their charges to customers, either through their prices for service or through surcharges on customer bills."[43]

Sprint is wrong, however, regarding the second half of its assertion: the Commission *did not* endorse the Bureau Chief's suggestion. Here is what the Commission actually wrote:

> Finally, we reject Petitioners' contention that the Bureau's decision constitutes a "new [Bureau-created] policy" of assigning costs based on a wireless carrier's ability to recoup those costs from its customers. *The Bureau's observation that wireless carriers can recoup their costs from their customers is not, and was not, determinative of the cost allocation question.* It did, however, track the Commission's comments in the *E911 Second Memorandum Opinion and Order* that removal of the carrier cost recovery requirement in section 20.18(j) would have no negative impact on carriers because they could recoup their costs from customers through surcharges or increased rates.[44]

Even as it correctly ruled that the Wireless Chief's suggestion was not determinative of

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[41] Petition, p. 58, *citing In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, CC Docket No. 94-102, FCC 99-352, ¶ 54 (rel. Dec. 8, 1999) ("*Wireless E911 2d R&O*").

[42] Sprint Comments, pp. 15 fn. 32, 17-18 Fn. 41.

[43] *Re: King County, Washington Request Concerning E911 Phase I Issues,* Letter from Thomas J. Sugrue to Marlys Davis (May 7, 2001).

the cost allocation issue, the Commission made one significant error: the portion of the *Wireless E911 2d R&O* supposedly tracked by the Wireless Chief speaks only of CMRS carriers recovering their Phase I E911 costs through their rates – it makes no mention of surcharges.[45] NASUCA believes the Commission's error in its July 24, 2002, order was inadvertent and did not represent a significant modification of the *Wireless E911 2d R&O*.

B. There Is No Reason Why CMRS Carriers Should Be Excluded from the Consumer Protection Measures Concerning Full and Non-Misleading Billing Disclosures and Standardized Labeling.

1. The Rationale Underlying the *TIB Order* and Other Commission Orders Applies to CMRS Carriers.

With regard to CMRS providers, the Commission concluded that some of its TIB "may be inapplicable or unnecessary in the CMRS context."[46] However, the Commission indicated that it intended "to require CMRS carriers to comply with standardized labels for charges resulting from Federal regulatory action, if and when such requirements are adopted."[47] In addition, the Commission made it clear that "there are two rules that we think are so fundamental that they should apply to all telecommunications common carriers," namely: (1) that the service provider associated with each charge must be clearly identified on the customer's bill, and (2) that each bill prominently display a telephone number that customers may call, free-of-charge, to question any charge on the bill.[48] The Commission stated that it expected:

> [T]o apply the same rule to both wireline and CMRS carriers, however, because we believe that labels assigned to charges related to federal regulatory action should be consistent, understandable, and should not confuse or mislead

[45] NASUCA notes that Sprint makes a detailed argument that surcharges are not "rates" but rather are "rate elements." Sprint Comments, pp. 15, ftn. 32; 17-18, ftn. 41. NASUCA agrees generally that surcharges are

customers.[49]

Finally, the Commission noted that, although several of the guidelines it adopted in the *TIB Order* did not apply to wireless carriers, "such providers remain subject to the reasonableness and nondiscrimination requirements of sections 201 and 202 of the [1934] Act, and our decision here in no way diminishes such obligations as they may relate to billing practices of CMRS carriers."[50]

Taken together, these principles and guidelines, the Commission believed, "represent fundamental principles of fairness to consumers and just and reasonable practices by carriers."[51] Neither wireline nor wireless carriers are exempt from the application of these principles and guidelines.

2. Barring CMRS Carriers' Non-Mandated Line Items Does Not Violate Section 332(c)(3) of the Act.

Several CMRS carriers[52] contend that the Commission should deny the NASUCA petition because it is an impermissible attempt to regulate CMRS carriers' rates or rate structures, violates the Commission's 1994 decision to forbear from regulating wireless rates under 47 U.S.C. §205, and violates the prohibition on CMRS rate regulation in 47 U.S.C. §332(c)(3).[53] The Commission should reject these arguments. Regulation of billing and advertising practices is not a regulation of the carriers' charges.

The CMRS carriers' arguments have been presented to, and rejected by, federal courts in

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[49] *Id.*, ¶ 18.

[50] *Id.*, ¶ 19.

[51] *Id.*

[52] *See* Nextel Comments, p. 26; Cingular Comments, p. 18; VZW Comments, p. 11.

[53] Nextel, Cingular, AWS and VZW. Section 332 states, in relevant part, "Notwithstanding sections 152(b) and

recent years. For example, a federal district court rejected the very same arguments presented by Nextel, holding that Missouri's Attorney General could pursue state law claims of deceptive descriptions in advertising and consumer bills in state court because those claims were not preempted under Section 332(c).[54] Similar arguments raised by Cingular were rejected by the Seventh Circuit which wrote: "[C]laims [that] address not the rates themselves, but the conduct of [the wireless carrier] in failing to adhere to those rates [is] precisely the type of state law contract and tort claims that are preserved for the states under § 332 as the 'terms and conditions' of commercial mobile services."[55] In short, NASUCA's Petition concerns billing and advertising and is not preempted by Section 332(c)(3) or the Commission's decision to forbear.

III. THE LINE ITEMS THAT ARE THE FOCUS OF NASUCA'S PETITION ARE MISLEADING, OFTEN DECEPTIVE, AND GENERALLY UNREASONABLE.

If consumers are going to be charged a monthly fee or surcharge to recover a carrier's costs, especially costs to comply with government regulation, both consumers and the government have an interest in the accuracy of the carrier's charge – not only the characterization, but also the amount. This principle cannot honestly be disputed. Despite the hue and cry commenters raise over their right to "advise consumers about the true cost of government regulation," and their assurance that the fees and disclosures meet or exceed the *TIB Order*'s requirements, the regulatory line items that NASUCA identified neither advise customers about the true cost of government regulation nor do they meet or exceed the *TIB Order*'s requirements. Other line items have even less rationale.

A. The IXCs' Regulatory Line Items Do Not Meet Or Exceed The *TIB Order*'s Principles and Guidelines.

Some carriers go to great lengths to discuss the accuracy of their billing descriptions and disclosures, and the format and organization of their bills.[56] The carriers' efforts are unavailing. The Commission has already – in its *TIB Order* – spoken to the misleading and deceptive nature of lump sum surcharges and fees that seek to recover costs associated with numerous regulatory programs. On this very point, the Commission wrote:

> We believe that so long as we ensure that consumers are readily able to understand and compare these charges, competition should ensure that they are recovered in an appropriate manner. Moreover, we are concerned that precluding a breakdown of line item charges would facilitate carriers' ability to bury costs in lump figures. *Insofar as regulatory-related charges have different origins, and are applied to different service and provider offerings, we also question whether implementation of a lump-sum figure for all charges resulting from federal regulatory action could be presented in a manner which consumers could clearly understand the origin of such a charge.*[57]

The Commission's concerns about lump sum charges apply to the "regulatory" line items complained of by NASUCA. Consider the interexchange carrier's ("IXCs") regulatory line items. AT&T's "Regulatory Assessment Fee," for example, purportedly helps the company recover the following costs: "interstate access charges; regulatory compliance and proceedings costs and property taxes."[58] The costs purportedly recovered by AT&T's charge certainly have "different origins and application to different service offerings." Its customers have no way of ascertaining what "regulatory compliance and proceedings" are involved (federal, state or both, telecommunications regulation or every government regulation). Nor can AT&T's customers

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[56] Nextel Comments, pp. 7-12; Leap Comments, pp. 8-10; AT&T Wireless Comments, pp. 5-6; Cingular Comments, pp. 12-22, VZW Comments, pp. 22-33.

[57] TIB Order, ¶ 56 (emphasis added). It is true that, in the next breath, the Commission "recognize[d] that consumers may benefit from a simplified total charge approach," and therefore encouraged industry and consumer groups to consider whether categorization and aggregation of charges would be advisable (such as putting all line